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No. 82-729

# In the Supreme Court of the United States

OCTOBER TERM, 1983

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL., APPELLANTS

*v.*

TIME, INC.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK*

## REPLY BRIEF FOR THE APPELLANTS

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In our opening brief, we showed that the statutory scheme at issue does not bar the use of illustrations of currency for expressive purposes, but merely prohibits magazine publishers such as appellee from printing photographs of United States currency in color or in dimensions approximating the actual size of the currency depicted. Appellee and other publishers are free to print illustrations of currency that comply with these reasonable "time, place and manner" limitations, which Congress concluded were necessary to protect against counterfeiting. Accordingly, we argued that the statutory scheme is constitutional because it serves a concededly compelling governmental interest in a manner that does not significantly restrict First Amendment rights.

Appellee responds by contending, in essence, that the statutory scheme effects a massive infringement on its First Amendment rights, that Congress erred in concluding that the statutory restrictions were necessary to protect against counterfeiting, and that the statute is unconstitutional because Congress is capable of enacting legislation that is less restrictive of expressive activity and that would serve the anticounterfeiting purpose equally as well as the current statutory scheme. These contentions are without merit.

1. The central theme of appellee's response is that the statutory scheme is overbroad because it prohibits the publication of some photographs of currency that have no capacity to deceive and that therefore pose no counterfeiting threat. Appellee's overbreadth analysis, however, rests on a grossly distorted view of the First Amendment interests at stake in this case (see Time Br. 20-24). Appellee persists in its efforts to portray this case as one involving "government censorship" of the press (J.A. 93). See, *e.g.*, Time Br. 20 (describing the statutory scheme as "a law that purports to control the editorial content of [appellee's] magazines"); *id.* at 23 n.19 ("what the statutory scheme really amounts to is an abridgement of the rights of editors and publishers to exercise editorial control and judgment over the material they publish"); *id.* at 24 (referring to "the Government's total ban on the use of a particularly evocative symbol"); *id.* at 25 ("the statute directly and dramatically abridges the freedom to communicate").

Notwithstanding appellee's hyperbolic rhetoric, it bears repeating that the statutory scheme does not prevent the press from expressing any view on any subject, or from including any number of color illustrations in its magazines. Nor does the statutory scheme preclude the press from using illustrations of United States currency for expressive purposes, so long as the reasonable color and size requirements of 18 U.S.C. 504(1) are satisfied. So far as we are

aware, this Court has never held that such trivial sorts of regulations raise a substantial question of freedom of expression under the First Amendment. The restrictions at issue here are not materially different, in their impact on expression, from municipal ordinances that regulate the decibel level of loudspeakers, or the size and height of outdoor advertising signs, which this and other courts have concluded are permissible under the First Amendment as reasonable time, place and manner regulations. See, *e.g.*, *Kovacs* v. *Cooper*, 336 U.S. 77 (1949); *Baldwin* v. *Redwood City*, 540 F.2d 1360, 1368-1369 (9th Cir. 1976), cert. denied, 431 U.S. 913 (1977); *Temple Baptist Church, Inc.* v. *City of Albuquerque*, 646 P.2d 565, 573 (N.M. 1982); *Krych* v. *Village of Burr Ridge*, 444 N.E. 2d 229, 232-233 (Ill. 1982).[1] Thus, appellee's "censorship" claim — which is critical to appellee's attack on the constitutionality of the statutory scheme — falls of its own weight.

2. What appellee really appears to be arguing is that, under the First Amendment, an editor's preference for publishing illustrations of currency in color, rather than in black and white, overrides Congress' considered judgment that the publication of color photographs of currency must be prohibited in order to protect against counterfeiting. In

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[1]The restrictions here are also akin to regulations placing size limitations on certain classes of mail (see U.S. Postal Service, *Domestic Mail Manual* § 352.1 (1981)), or to court rules imposing page and typeface limitations for briefs. See, *e.g.*, Sup. Ct. R. 33.1.(b) and 33.3. Yet, if this Court accepts appellee's claim that its First Amendment rights are significantly abridged by the color and size restrictions on reproductions of illustrations of currency, then presumably it will be open to litigants in future cases to assert that their First Amendment right to freedom of expression has similarly been abridged by decibel level statutes, billboard ordinances, postal regulations, or court rules that merely impose reasonable and seemingly innocuous restrictions on the manner in which a message may be conveyed.

support of this argument, appellee relies (Time Br. 42-43, 44-45) on the district court's finding that the materials used to prepare appellee's color illustrations of currency could not be used to counterfeit money. But, as we pointed out in our opening brief (at 30-31), even assuming the validity of this finding — which is based on the self-serving representations of appellee's own editors with respect to the particular illustrations involved in this case — the district court nonetheless erred in concluding that the statute is unconstitutional on its face.

In enacting Section 504(1), Congress noted that, historically, the Secretary of the Treasury had permitted the publication of illustrations of currency, but that, "[t]o prevent any possibility of the illustrations being used as an instrument of fraud, such special permission has been limited to the use of black-and-white illustrations less than three-fourths or more than 1½ times the size of the genuine paper money." S. Rep. 2446, 85th Cong., 2d Sess. 5 (1958); H.R. Rep. 1709, 85th Cong., 2d Sess. 3 (1958). Congress added that "[i]t is the opinion of the Treasury Department that the printing in publications of black-and-white illustrations of paper money and other obligations and securities of the United States restricted in size will not facilitate counterfeiting." S. Rep. 2446, at 5-6; H.R. Rep. 1709, at 3. By adopting the color and size restrictions proposed by the Treasury Department, Congress effectively made a legislative finding that these restrictions are necessary to protect against counterfeiting. That legislative finding is entitled to a presumption of validity. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973); J. Sutherland, *Statutes and Statutory Construction* § 38.07, at 100 (C.D. Sands 4th ed. 1973).

**Appellee's overstated assertions fail to overcome the presumption of validity that attaches to the congressional finding underlying the color and size restrictions in Section**

504(1) and do not justify "exercise of the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). Even if the particular color illustrations of currency in appellee's magazines, and the materials used to produce them, could not be of use to a counterfeiter, it certainly does not follow that Congress erred in finding that the color and size restrictions are necessary to protect against counterfeiting. Appellee appears to concede as much by failing to respond to our contention that the restrictions in Section 504(1) are necessary to protect against the publication of full size, full color reproductions of United States currency (see Time Br. 46).

3. Appellee suggests, however, that the statute is unconstitutional because Congress could enact a narrower statute that would punish the publication of an illustration of currency that has a "capacity to deceive." But appellee fails to cite a single case in which this Court has struck down an otherwise valid time, place and manner restriction because the restriction was not the least intrusive means available to accomplish the legislative goal. Furthermore, as we pointed out in our opening brief (at 34 & n.25), the standard that appellee suggests would be difficult, if not impossible, to apply and would entail the additional danger of discriminatory enforcement based on the content of the message. Although it is not inconceivable that the anticounterfeiting interest served by the statute might be served by some other, less restrictive formulation, that possibility is not a sufficient basis for invalidating the statute, given the statute's insignificant impact on First Amendment rights.

In determining whether the statutory scheme unnecessarily restricts expression protected by the First Amendment, we submit that it is necessary to consider the extent to which that scheme actually impinges on First Amendment interests. In *Buckley* v. *Valeo*, 424 U.S. 1, 30 (1976), for

example, the Court rejected a First Amendment overbreadth challenge to a statute imposing a $1,000 limitation on political contributions by an individual to any single candidate per election. The parties challenging the statute argued that the $1,000 limitation was unrealistically low because a much larger contribution would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or office holder, especially in campaigns for statewide or national office. In rejecting this argument, the Court explained (424 U.S. at 30; footnote and citations omitted; emphasis added):

> While the contribution limitation provisions might well have been structured to take account of the graduated expenditure limitations for congressional and Presidential campaigns, *Congress' failure to engage in such fine tuning does not invalidate the legislation.* As the Court of Appeals observed, "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Such distinctions in degree become significant only when they can be said to amount to differences in kind.*

Similarly, in *Baldwin* v. *Redwood City, supra,* the court held that city code provisions limiting the size of temporary signs and limiting the aggregate area of such signs that could be displayed on a single parcel of land do not offend the First Amendment. The court observed that "[n]either limitation significantly deters the exercise of First Amendment rights; they are comparable to the decibel restriction on sound trucks upheld in *Kovacs* v. *Cooper, supra.*" 540 F.2d at 1369. Although the court noted that the relationship of the restriction on aggregate sign area to the municipal interests it assertedly served was "attenuated and the unavailability of less restrictive alternatives questionable," the court nevertheless upheld the restriction because "the

burden imposed on free speech by this restriction is so minimal that generous allowance may be made for municipal preferences." *Ibid.*

Here, as we have shown, the *First Amendment* interest in publishing color, rather than black and white, illustrations of currency is quite minimal,[2] the color and size restrictions serve the concededly compelling governmental interest in protecting against counterfeiting, and the statute leaves open ample alternative channels of communication. In these circumstances, we submit that, because the lines drawn in the statute are reasonable, "Congress' failure to engage in [the] fine tuning [suggested by appellee] does not invalidate the legislation." *Buckley* v. *Valeo*, 424 U.S. at 30.

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

REX E. LEE
*Solicitor General*

NOVEMBER 1983

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[2]We do not doubt that a newspaper publisher may have legitimate reasons for wishing to print a dollar bill in color rather than in black and white, but it trivializes the Constitution to suggest that those reasons give rise to a significant First Amendment interest.